No. 80-193

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,

Petitioners,

v.

THE GENERAL MOTORS CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Counterstatement of Questions Presented

1. Does a pension plan that integrates plan benefits with statutory workers' compensation benefits by reducing the one by the other violate §203 of the Employee Retirement Income Security Act of 1974 ("ERISA"), P.L. 93-406, 29 U.S.C. §1053?

2. Is N.J. Stat. Ann. 34:15-29, as amended by Chapter 156 of the New Jersey Laws of 1977, preempted by ERISA under the Supremacy Clause and §514(a) of ERISA, 29 U.S.C. §1144(a)?

Parties to the Proceeding

Plaintiffs-Appellees-Petitioners:

Henry Buczynski, Alex Borusovic and Other Retirees Similarly Situated

Defendant-Appellant-Respondent:

General Motors Corporation

Intervenor:

State of New Jersey

As Amici Curiae:

Carmen F. Gargon, Frank E. Doumont, Robert Milanovich, Wayne C. Banks, Michael E. Barna, Paul J. Miller and George Zihol

Gray Panthers

Shenango, Inc., U.S. Steel Corp., Crucible Inc., Jones & Laughlin Steel Corporation, Mesta Machine Company, Pullman-Standard and Wheeling-Pittsburgh Steel Corp.

United States (Tax Division, Department of Justice)

TABLE OF CONTENTS

PAGE

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING i

OPINIONS BELOW 1

REASONS FOR DENYING THE WRIT—The Third Circuit correctly decided the issues and its decision is not in conflict with any decisions of this Court or of any other federal court of appeals:

I—The workers' compensation integration provision in the GM Pension Plan is lawful under §203(a) of ERISA, 29 U.S.C. §1053 2

II—As applied to the GM Pension Plan, N.J. Stat. Ann. 34:15-29 is expressly preempted by ERISA 9

CONCLUSION 12

Cases Cited

Alessi v. Raybestos-Manhattan, Inc., Civ. No. 78-0434 (D. N.J. Feb. 15, 1979), rev'd sub nom. Buczynski v. General Motors Corporation, 616 F. 2d 1238 (3d Cir. 1980), appeal docketed, No. 79-1943 (U.S. June 10, 1980) 7

Baker v. Otis Elevator Co., 609 F.2d 686 (3d Cir. 1979) 5

Batterton v. Francis, 432 U.S. 416 (1977) 5

Bordine v. Evans Product Co., 453 F.Supp. 19 (E.D. Mich. 1978) 7

PAGE

Bucyrus-Erie Co. v. Department of Industry, Labor and Human Relations, 599 F.2d 205 (7th Cir. 1979), cert. denied, 48 U.S.L.W. 3451 (1980) 11

Carlson v. Bundy Corp., Civ. No. 6-72774 (E.D. Mich. Aug. 18, 1977) 7

Carpenter Technology Corp. v. Boyton, Civ. No. 78-1415 (D.N.J. Dec. 12 1979), modified (D.N.J. March 7, 1980) 7

De Canas v. Bica, 424 U.S. 351 (1976) 10

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 10

Fremont v. McGraw-Edison Co., 606 F.2d 752 (7th Cir. 1979) 4

Helvering v. Winmill, 305 U.S. 79 (1938) 8

Hewlett Packard Co. v. Barnes, 425 F. Supp. 1294 N.D. Cal. 1977), aff'd per curiam, 571 F.2d 502 (9th Cir. 1978), cert. denied, 439 U.S. 831 (1978) 11

Hines v. Davidowitz, 312 U.S. 52 (1941) 10

Jones v. Rath Packing Co., 430 U.S. 519 (1977) 10

Nachman Corporation v. Pension Benefit Guaranty Corporation, 48 U.S.L.W. 4524 (1980) 3, 6

Pavlovic v. Chrysler Corp., Civ. No. 7-70438 (E.D. Mich. Jan. 10, 1978) 7

Pervel Industries, Inc. v. Connecticut Commission on Human Rights and Opportunities, 603 F.2d 214 (2d Cir. 1979), aff'g without opinion 468 F. Supp. 490 (D. Conn. 1978), cert. denied, 48 U.S.L.W. 3451 (1980) 11

PAGE

Riley v. MEBA Pension Trust, 570 F.2d 406 (2d Cir. 1977), on remand, 456 F.Supp. 117 (S.D. N.Y. 1978), aff'd, 586 F.2d 968 (2d Cir. 1978) 4

Server v. Interpace Corporation, appeal docketed, No. 79-3832 (9th Cir. Dec. 7, 1979) 7

Stong v. Bucyrus-Erie Co., 472 F.Supp. 1089 (E.D. Wis. 1979), appeal docketed, No. 80-1755 (7th Cir. May 23, 1980) 7

Utility Workers Union v. Consumers Power Co., 453 F.Supp. 447 (E.D. Mich. 1978), appeal docketed, No. 78-1402 (6th Cir. Aug. 2, 1978) 7

Wadsworth v. Whaland, 562 F.2d 70 (1st Cir. 1977), cert. denied, 435 U.S. 980 (1978) 11

Winer v. Edison Brothers Stores Pension Plan, 593 F.2d 307 (8th Cir. 1979) 4

Statutes Cited

Employee Retirement Income Security Act of 1974, P.L. 93-406:

§3(19), 29 U.S.C. §1002(19) 3

§203, 29 U.S.C. §1053 .....i, 3, 6, 9, 10

§203(a), 29 U.S.C. §1053(a) 2, 3

§203(a)(3), §29 U.S.C. §1053(a)(3) 3, 7

§203(a)(3)(B), 29 U.S.C. §1053(a)(3)(B) 4

§206(b), 29 U.S.C. §1056(b) 8

§302(c)(4)(A), 29 U.S.C. §1082(c)(4)(A) 8, 9

§514(a), 29 U.S.C. §1144(a) .....i, 10, 11

§3002(c), 29 U.S.C. §1202(c) 3, 5

PAGE

Internal Revenue Code of 1939, 26 U.S.C. §165, as amended by Revenue Act of 1942, §162, 56 Stat. 798 7

Internal Revenue Code of 1954, as amended, 26 U.S.C.:

§401(a)(5) 7-9

§401(a)(15) 7, 8

§412(c)(4)(A) 8, 9

New Jersey Workers' Compensation Act N.J. Stat. Ann. 34:15-29, as amended by N.J.L. 1977, c. 156 ..i, 10, 11

Regulations Cited

26 C.F.R. §§1.411(a)-4(a) (1979) 3, 5, 6

29 C.F.R. §2605.2 (1979) 6

29 C.F.R. §2605.6 (1979) 6

Other Authorities Cited

120 Cong. Rec. S15,737 (1974) 11

H. Rep. No. 93-1280, 93d Cong., 2d Sess., p. 277, 3 [1974] U.S. Code Cong. & Admin. News 5038, 5058 9

IRS Pub. No. 778, Guides for Qualification of Pension, Profit-Sharing and Stock Bonus Plans 15 (1972) 8

Rev. Rul. 68-243, 1968-1 C.B. 157 8

Rev. Rul. 69-421, 1969-2 C.B. 61 8

Rev. Rul. 78-178, 1978-1 C.B. 117 8

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RESPONDENT'S BRIEF IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals is reported at 616 F.2d 1238 and is reproduced in Appendix A to the petition. The opinions of the District Court are reported at 456 F.Supp. 867 and 464 F.Supp. 133.

REASONS FOR DENYING THE WRIT

The Third Circuit correctly decided the issues and its decision is not in conflict with any decisions of this Court or of any other federal court of appeals.

I. The workers' compensation integration provision in the GM Pension Plan is lawful under §203(a) of ERISA, 29 U.S.C. §1053(a).

Article IV, Section 2, of the General Motors Hourly Employees' Pension Plan (hereinafter referred to as the "GM Pension Plan" or the "Plan") provides, in determining the monthly benefits payable under the Plan, for a deduction, under specified circumstances, of certain types of workers' compensation benefit payments. Petitioners are retired employees of respondent, General Motors Corporation, affected by that Plan provision. They urge here, as they did below, that the provision violates ERISA §203(a), 29 U.S.C. §1053(a), which requires, *inter alia,* that every pension plan subject to Title I of ERISA[1] "provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age." Petitioners' argument, quite simply, is that (1) §203(a) prohibits all forfeitures of normal retirement benefits upon attainment of normal retirement age, and (2) the deduction for workers' compensation benefits provided in the GM Pension Plan is a forfeiture and, as such, prohibited.

The Third Circuit rejected petitioners' position as based upon the erroneous assumption that all benefit offsets or deductions constitute forfeitures—an assumption inconsistent not only with other provisions of ERISA and its legislative history, but with the express provisions of a regula-

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[1] The GM Pension Plan is subject to Title I of ERISA.

tion, 26 C.F.R. §1.411(a)-4(a) (1979), adopted by the Treasury Department in its exercise of legislative rulemaking expressly delegated to it by ERISA §3002(c), 29 U.S.C. §1202(c), which regulation the Third Circuit found valid.

Petitioners suggest that the decision below is somehow inconsistent with this Court's decision in *Nachman Corporation* v. *Pension Benefit Guaranty Corporation,* 48 U.S. L.W. 4524 (1980). Although *Nachman* was concerned solely with the operation of the pension plan termination provisions of Title IV of ERISA, which are in no way involved in the present case, this Court did make certain observations concerning ERISA §203(a). Petitioners seize upon the observations in note 10 of Mr. Justice Stevens' majority opinion (Slip Op. at 6, 48 U.S.L.W. at 4525-26) and note 9 of Mr. Justice Stewart's dissenting opinion therein (Slip Op. at 5, 48 U.S.L.W. at 4532) as indicating that ERISA §203 and the definition of "nonforfeitable" in ERISA §3(19), 29 U.S.C. §1002(19), preclude any forfeiture or condition to receipt of vested benefits other than one enumerated in ERISA §203(a)(3). However, petitioners overlook this Court's analysis of the concept of "nonforfeitability" in Title I of ERISA, which goes to the heart of its decision in *Nachman.* Looking to the §3(19) definition, Mr. Justice Stevens noted that "the principal subject of the definition is the word 'claim'; it is the claim to the benefit, rather than the benefit itself, that must be 'unconditional' and 'legally enforceable against the plan' " (Slip Op. at 11, 48 U.S.L.W. at 4527). Then, looking to §203(a), he stated (Slip Op. at 12, 48 U.S.L.W. at 4527):

> [T]he term "forfeiture" normally connotes a total loss in consequence of some event rather than a limit on the value of a person's rights. Each of the examples of a plan provision that is expressly de-

> scribed as not causing a forfeiture listed in §203(a)(3), see n. 10, *supra,* describes an event—such as death or temporary re-employment—that might otherwise be construed as causing a forfeiture of the entire benefit. It is therefore surely consistent with the statutory definition of "nonforfeitable" to view it as describing the quality of the participant's right to a pension rather than a limit on the amount he may collect.

This is precisely the rationale of the Third Circuit's opinion below, holding that a deduction from a pension by way of an offset integrating plan benefits with state workers' compensation benefits is not a forfeiture and thus does not fall within §203(a). Indeed, the GM Pension Plan provision at issue itself states clearly that its operation is "in determining the monthly benefits payable under this Plan . . ." Thus, that Plan provision is not one "describing the quality of the participant's right to a pension," but rather one imposing "a limit on the amount he may collect," *i.e.,* by way of integration of Plan and non-Plan benefits.

For the same reason, the case at bar is not in conflict with the decisions of the Second, Seventh, and Eighth Circuits in *Riley* v. *MEBA Pension Trust,* 570 F.2d 406 (2d Cir. 1977), *on remand,* 456 F.Supp. 117 (S.D. N.Y. 1978), *aff'd,* 586 F.2d 968 (2d Cir. 1978); *Fremont* v. *McGraw-Edison Co.,* 606 F.2d 752 (7th Cir. 1979); or *Winer* v. *Edison Brothers Stores Pension Plan,* 593 F.2d 307 (8th Cir. 1979). *Riley* was concerned with a suspension of pension plan benefits during a period of reemployment which did not meet the requirements of the exception in §203(a)(3)(B); *Fremont* and *Winer* each involved a total forfeiture of plan benefits under a so-called "bad boy" clause. In both situations, there was a direct effect upon "the quality of

the participant 's right to a pension rather than a limit on the amount he may collect," wholly unlike the case at bar.

Thus, there is no conflict between the decision of the Third Circuit below and that of this Court or any other federal court of appeals.

Petitioners urge that *certiorari* be granted as to this issue because it is important and has not been decided by this Court.[2] However, the Third Circuit's decision is founded upon reasoning fully consistent with prior decisions of this Court. The Third Circuit relied initially upon 26 C.F.R. §1.411(a)-4(a) (1979), which expressly provides that "nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining planned benefits."

This regulation, like the one at issue in the Third Circuit's prior opinion in *Baker* v. *Otis Elevator Co.*, 609 F.2d 686 (3d Cir. 1979), is a "legislative rule" rather than merely an "interpretative rule," exclusive rule-making power having been delegated expressly by Congress to the Secretary of the Treasury in ERISA §3002(c), 29 U.S.C. §1202(c). As this Court held in *Batterton* v. *Francis,* 432 U.S. 416, 426 (1977), such a regulation "can be set aside only if the Secretary exceeded his statutory authority or if the regulation is 'arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law."

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[2] Petitioners' references to the number of plans allegedly affected (Petition at 5-6) are devoid of record or other support.

The Third Circuit held that this burden cannot be sustained because the legislative history of ERISA "affirmatively supports the Treasury regulations" (Appendix at 13). Indeed, as merely a "contemporary construction of the statute" by the agency designated to enforce it, this would preclude its rejection, as this Court noted in *Nachman* in the context of this very Treasury regulation and a correlative PBGC regulation (Slip Op. at 13 and nn. 18-19, 48 U.S.L.W. at 4527-28).

It is pertinent here to observe that 26 C.F.R. §1.411(a)-4(a) (1979) has a PBGC cognate in 29 C.F.R. §2605.2 (1979), which[3] defines "pension benefit" in terms of its being a benefit which "in combination with Social Security, Railroad Retirement, *or workmen's compensation benefits* provide a substantially level income to the recipient" (emphasis added). Thus, not one but two agencies to which Congress has expressly delegated rulemaking functions have construed ERISA as authorizing employers to integrate benefits under their private pension plans with benefits under state workers' compensation laws.

In any event, as the Third Circuit correctly concluded, the legislative history of ERISA §203 makes it clear that pension plan provisions taking into account workers' compensation benefits in determining plan benefits, such as the Plan provision at issue herein, remain, since the enactment of ERISA as before, perfectly lawful and proper.

As the Third Circuit noted (Appendix at 19), the primary defect in the analysis of the district court below

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[3] Implementing the PBGC definition of "nonforfeitable" in 29 C.F.R. §2605.6 (1979) cited in *Nachman* (Slip Op. at 13 n. 18, 48 U.S.L.W. at 4527).

is that if offsets of workers' compensation benefits are deemed to constitute forfeitures because they are not expressly "saved" by §203(a)(3), then so also must all offsets of Social Security benefits, also not expressly saved by §203(a)(3). Yet, it is clear beyond dispute that Social Security benefits have consistently been subject to offset under §401(a)(5) of the Internal Revenue Code of 1954, as amended (hereinafter referred to as the "Code"), 26 U.S.C. §401(a)(5),[4] and its predecessor 1939 Code provision,[5] which was reenacted by ERISA with

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[4] The district court below adopted its analysis from that of *Utility Workers Union* v. *Consumers Power Co.*, 453 F.Supp. 447 (E.D. Mich. 1978), *appeal docketed*, No. 78-1402 (6th Cir. Aug. 2, 1978), which was founded upon the mistaken assumption that the source of benefit integration is Code §401(a)(*15*), added by ERISA, which refers only to Social Security benefits, but by way of limitation and not authorization, rather than §401(a)(*5*). Those cases subsequently decided to the same effect by district courts—all prior to the Third Circuit decision herein—adopted the analysis of *Utility Workers* and of the district court below based thereon. *Alessi* v. *Raybestos-Manhattan, Inc.*, Civ. No. 78-0434 (D. N.J. Feb. 15, 1979), *rev'd sub nom. Buczynski* v. *General Motors Corporation*, 616 F.2d 1238 (3d Cir. 1980), *appeal docketed*, No. 79-1943 (U.S. June 10, 1980); *Carpenter Technology Corp.* v. *Boyton*, Civ. No. 78-1415 (D.N.J. Dec. 12, 1979), *modified* (D.N.J. March 7, 1980); *Stong* v. *Bucyrus-Erie Co.*, 472 F.Supp. 1089 (E.D. Wis. 1979), *appeal docketed*, No. 80-1755 (7th Cir. May 23, 1980). In a further case on the subject pending appeal, *Server* v. *Interpace Corporation, appeal docketed*, No. 79-3832 (9th Cir. Dec. 7, 1979), no opinion was rendered. Contra, *Bordine* v. *Evans Product Co.*, 453 F. Supp. 19 (E.D. Mich. 1978); *Pavlovic* v. *Chrysler Corp.*, Civ. No. 7-70438 (E.D. Mich. Jan. 10, 1978); *Carlson* v. *Bundy Corp.*, Civ. No. 6-72774 (E.D. Mich. Aug. 18, 1977).

[5] 26 U.S.C. §165 (I.R.C. 1939), as amended by Revenue Act of 1942, §162, 56 Stat. 798.

amendments irrelevant here, and remain subject to offset under ERISA.[6]

It is, moreover, §401(a)(5)—which provides that "a plan [shall not] be considered discriminatory . . . merely because the contributions or benefits of or on behalf of employees . . . differ because of any retirement benefits created under State or Federal law"—under which the Internal Revenue Service has long held that state workers' compensation benefits may be offset against pension plan benefits.[7] The fact of the amendment of §401(a)(5) without relevant change gives added force to the long-standing Treasury regulation and administrative interpretation thereunder. *Helvering* v. *Winmill,* 305 U.S. 79, 83 (1938).

That this implementation of §401(a)(5) has survived ERISA is indicated by the statement in the Conference Committee Report on ERISA that:

> Moreover, the conferees intend that the antidiscrimination rules of present law in areas other than the vesting schedule are not to be changed. Thus, the present antidiscrimination rules with respect to coverage, and with respect to contributions and benefits are to remain in effect. Also, the antidiscrimination rules may be applied with respect to benefit accruals.

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[6] References throughout ERISA, *e.g.,* in ERISA §§206(b) and 302(c)(4)(A), 29 U.S.C. §§1056(b) and 1082(c)(4)(A), and their Code equivalents, 26 U.S.C. §§401(a)(15) and 412(c)(4)(A) make this abundantly clear.

[7] Rev. Rul. 68-243, 1968-1 C.B. 157, 158, integrated in Rev. Rul. 69-421, §4(j)(4), 1969-2 C.B. 61, 72, and IRS Pub. No. 778, Guides for Qualification of Pension, Profit-Sharing, and Stock Bonus Plans 15 (1972). See Appendix at 22-23. This ruling was reaffirmed post-ERISA in Rev. Rul. 78-178, 1978-1 C.B. 117.

H. Rep. No. 93-1280, 93d Cong., 2d Sess., p. 277, 3 [1974] U.S. Code Cong. & Admin. News 5038, 5058.

This conclusion is reinforced by the fact that §302(c)(4)(A) of ERISA, 29 U.S.C. §1082(c)(4)(A), and its Code counterpart §412(c)(4)(A), 26 U.S.C. §412(c)(4)(A), expressly provide for taking into account "a change in benefits under the Social Security Act *or in other retirement benefits created under Federal or State law*" (emphasis added)—the very phraseology employed in §401(a)(5)—in determining the minimum funding required for pension benefit plans. If such changes can be taken into account for funding purposes, it can only be because the benefits themselves can be taken into consideration in determining the amount of plan benefits in the first instance.

All of the foregoing, it is submitted, leads inexorably to the conclusion that Congress intended in ERISA to leave intact the preexisting system under which employers were permitted to and did take into account in determining plan benefits various types of nonplan benefits, including specifically workers' compensation benefits; that the Treasury, which urged the result reached by the Third Circuit in its brief below as *amicus curiae*, has faithfully carried out its Congressional delegation of rulemaking power; and that Article IV, Section 2, of the GM Pension Plan is lawful and valid under §203 of ERISA.

II. As applied to the GM Pension Plan, N.J. Stat. Ann. 34:15-29 is expressly preempted by ERISA.

The second issue before the Third Circuit and to which the petition is addressed arises by reason of the enactment of Chapter 156 of the New Jersey Laws of 1977, which, effective July 14, 1977, amended N.J. Stat. Ann.

34:15-29, part of the New Jersey Workers' Compensation Act, to provide that:

> The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.

The Third Circuit held that this statute is superseded by ERISA's preemption provision, §514(a), 29 U.S.C. §1144(a), which expressly provides that, with specific exceptions not here applicable, Titles I and IV of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" subject to Title I.

Petitioners contend that this holding conflicts with this Court's decisions in *De Canas* v. *Bica,* 424 U.S. 351 (1976), and *Jones* v. *Rath Packing Co.,* 430 U.S. 519 (1977). Petitioners rely upon *De Canas* largely for its reference to workmen's compensation laws as an example of the broad authority states have under their police powers to regulate the employment relationship to protect workers within the state (424 U.S. at 356). However, *De Canas,* no less than *Jones,* clearly stands for the principle, enunciated in *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142 (1963), and restated in *Jones,* that "when Congress has 'unmistakably . . . ordained,' . . . that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall" (430 U.S. at 525).

Section 514(a) unmistakably so ordains.[8] The legislative history of §514(a) makes it abundantly clear that, as

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[8] Indeed, even if it did not, the conclusion that §203 sanctions the offsets at issue would compel the conclusion that a contrary result under state law would stand "as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941).

Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, stated in presenting the Conference Committee Report on ERISA, it was the intention of Congress "to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans," and that the principle of preemption "is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law." 120 Cong. Rec. S15,737 (1974). This intent has been given full effect, absent specific exception within §514, by every court of appeals before which the issue has arisen.[9]

The GM Pension Plan is one subject to Title I of ERISA. On its face, N.J. Stat. Ann. 34:15-29, as amended, "relates to" such pension plans; indeed, as the Third Circuit pointed out, it has no function except in its relation to private pension plans. It is, therefore, preempted expressly by §514(a) under the deliberately broad and all-encompassing sweep of that provision, as the Treasury has urged and as the Third Circuit has held.

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[9] See, *e.g.*, *Wadsworth* v. *Whaland*, 562 F.2d 70, 76-77 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978); *Pervel Industries, Inc.* v. *Connecticut Commission on Human Rights and Opportunities*, 603 F.2d 214 (2d Cir. 1979), *aff'g without opinion* 468 F. Supp. 490 (D. Conn. 1978), *cert. denied*, 48 U.S.L.W. 3451 (1980); *Bucyrus-Erie Co.* v. *Department of Industry, Labor and Human Relations*, 599 F.2d 205 (7th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3451 (1980); *Hewlett-Packard Co.* v. *Barnes*, 425 F. Supp. 1294, 1297-1300 (N.D. Cal. 1977), *aff'd per curiam*, 571 F.2d 502 (9th Cir. 1978), *cert. denied*, 439 U.S. 831 (1978).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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